

THE ROLE OF LAW IN WORLD POLITICS*

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On June 14, 1946, Mr. Bernard Baruch in presenting the United States Atomic Energy Proposals to the United Nations said: "We are here to make a choice between the quick and the dead." He added: "We must elect World Peace or World Destruction."¹ Today, less than three years later, it appears that mankind may have chosen death and destruction.

From the perspectives of all people who prefer a democratic world order, with freedoms and with peaceful procedures as the primary instruments of social change, the proposals of the United States were most generous. The testimony of the best qualified experts is, furthermore, that these proposals would have brought the peoples of the world the greatest security against violence, aggression, and war that is technically possible.² Though accepted and even demanded by an overwhelming majority of nations, these proposals were rejected by the small group of men who rule Russia and its satellites, and who view the world process as a fight to the death between two competing systems.

What the United States proposed has been briefly summarized as follows:

1. Establishment of an international authority to be in sole control of all operations classed as dangerous, and to have power to deal with new developments as they arise.
2. The authority to license, control and inspect all other atomic energy activities left under national control.
3. The power of veto not to apply either to the day-to-day work of the authority or to the punishment of transgressors.
4. The control scheme to be put into effect in successive stages, the United States gradually relinquishing, to the extent required by each stage, national control of its atomic activities.³

This is the clearest offer for world government by consent that a great power has ever made.⁴ Had this offer been accepted and made effective, with all needed ancillary measures, such as control over the dangers of

*An address delivered at the University of Mississippi on April 6, 1949, as part of the Centennial exercises of the University.

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¹FIRST REPORT OF THE UNITED NATIONS ATOMIC ENERGY COMMISSION TO THE SECURITY COUNCIL 81 (Dep't State 1946).

²This testimony is spread through the volumes of the BULLETIN OF ATOMIC SCIENTISTS.

³Quoted from Friedwald, *The Atomic Deadlock Could Be Broken*, 4 BULL. A. S. 363 (1948).

⁴*Cf.* Nathanson, Review, 41 ILL. L. REV. 290 (1946).

bacteriological warfare, most of the other issues that today confront the world could have been resolved with relative ease. In the absence of such a minimum world police force, what we have instead is literally anarchy—a world governed not by authority and reason, but by continuing expectations of violence; a world marching steadily toward a new war with all the horrors anticipated from the new instruments of destruction; a world in which there is a growing famine of body and spirit and the prospect of rigorous economic depression; a world in which we see our traditional liberties, and a democratic sharing of power, becoming increasingly precarious in the garrison states deemed necessary to security. An optimist has come to be defined as a man who thinks the future is uncertain.

It is not because of the demands of the peoples of the world that we have come to this impasse. As never before, the peoples of the world are demanding security, in the sense of freedom from expectations of violence, and that wide sharing of power, respect, and enlightenment which we call democracy, and the freedom and opportunity to pursue higher standards of living, health, well-being, comfort, and congenial personal relations—all values that cannot be achieved without a peaceful world order. Conditioned by increasing exposure to the same attitudes (through movies, radio, and newspapers) by growing common skills (those of industrialization), by common character structures around the world, and by the accelerating disappearance of caste and class structures, there is a growing unification of peoples' demands everywhere, and increasing identifications by peoples with larger and larger groups, from locality to world community.⁵

Even the Russians cast their demands in terms of these same basic values and make their demands in terms of a world community. Where they purport to differ is largely in terms of means, of allegedly temporary compromises for greater ultimate fulfilment. Their basic expectations of the future include an inevitable collapse of Western civilization, because of alleged internal contradictions, with perhaps a "dying throes" attack upon Russia, and the replacement of Western capitalist democracy by a dictatorship of the proletariat, necessary *in theory* only to guide mankind to true democracy. It is not difficult, therefore, to see why the Russian elite spurned the American-Western offer of international control of atomic energy, with its beginnings of world government. To accept would have meant to end their hope of ruling the world by means of a tightly disciplined world-wide political party, and, by opening Russia up to a freer flow of enlightenment, might have meant to end their internal power. To accept would have required them to change all the perspectives with which they view the world and all their expectations and hopes of the future.

⁵Lasswell, *The Interrelations of World Organization and Society*, 55 YALE L. J. 889 (1946).

As frustrating as this deep-rooted intransigence of the contemporary Russian leaders is, the fact must be faced that any hope for the establishment of a world order under law, by peaceful means, depends ultimately upon cooperation from the Russians. I do not claim to dispose of any miracle-working method for securing this cooperation. Like you, I suspect any man who purports to have such a method as either an ignoramus or a charlatan or a dupe in the service of the enemies of democracy. The most that we can do is to seek to clarify the conditions under which a democratic world order under law can be established, to appraise trends in these conditions, and to increase critical awareness of rational methods of escape from the present anarchy.

Coming now to a more direct consideration of the role of law in world politics, much that I have to say may appear painfully obvious. I take comfort in the observation of Mr. Justice Holmes that it is of the obvious that we need most to remind ourselves. With respect to the subject of our discussion, Professor Niemeyer of Princeton has recently remarked:

There is no reality that is more compelling than the tacit premise conditioning all our actions. There is no force that is as inescapable as the images which dominate the subconscious layers of the mind, just because the issues seem so self-evident, so needless of discussion and consideration. And there is no obstacle that more persistently obstructs any practical progress than basic concepts which have been passed down to us, unrevised and unadjusted from a different age, and which, though outlived, still mold, unnoticeably, a living reality.⁶

It is, therefore, of the utmost importance that we understand quite clearly just what we mean by law, and also what values we seek to implement and effect by law, what factors we assume to condition our action, and what interrelations between law and other means we regard as rational design to secure our ends. In seeking this clarity I propose to break my remarks down under the following headings:

- I. Confused Notions about the Relations between Law and Other Variables in the World Power Process.
- II. The Traditional, but Unrealistic and Inadequate, Conception of International Law as Doctrine.
- III. The Necessity for Relating Law to the World Power Process, If Doctrine Is To Be Made Meaningful and We Are To Obtain Control of All Significant Variables.

⁶NIEMEYER, *LAW WITHOUT FORCE* 19 (1941).

- IV. How Power Is Shaped and Distributed on the Global Level—Law Defined as Formal Authority Conjoined with Effective Control.
- V. The Present Anarchy of International Doctrine and Practice with Respect to Major Democratic Values.
- VI. The Conditions that Produced the Contemporary Anarchy and How These Conditions Have Changed.
- VII. The Conditions of Democratic World Order under Law.
- VIII. Rational Alternatives in a Bi-Polar Power Structure.

You can see that I have not taken my assignment lightly. Considering these points seriatim, let us look first at our existing confusion of thought.

I. CONFUSED NOTIONS ABOUT THE RELATIONS BETWEEN LAW AND OTHER VARIABLES IN WORLD POWER PROCESS

Most of the many proposals for escape from our present impasse commit the fallacy of over-emphasizing some one of the several variables that play important roles in the world power process. Thus, there is a school of functionalists who insist that the quickest way to world government is to promote specialized world organizations, agencies and measures for every purpose other than power or security—such as, for the greater production and sharing of wealth, for the spread of enlightenment, for the protection of civil liberties and the promotion of respect for human beings simply as human beings, for improvement in standards of health and well-being, and so on.⁷ Their theory is that if all of these factors are gradually accounted for, it will eventually be possible to establish effective control for maintaining security. Conversely, there is a growing school of “world federalists” who insist that until the power variable is brought under limited control, until there is a moderately effective world police force, it is largely futile to clamor for more and stronger functional organizations.⁸ Nation states calculating every international move in terms of its effects on fighting power cannot be expected to do anything consequential on a world-wide scale about the greater production and sharing of wealth, enlightenment, respect, and so on. The world government promoters centered about President Hutchins at the University of Chicago go so far as to insist that anything less than full-blown world government, with a degree

⁷Mitrany, *The Functional Approach to World Organization*, 24 INT. AFF. 350 (1948); MITRANY, *A WORKING PEACE SYSTEM* (1946); Pelcovits, *World Government Now?* 193 HARPER'S 396 (1946); Cf. CROWTHER, *THE ECONOMIC RECONSTRUCTION OF EUROPE* 54 (1948).

⁸MEYER, *PEACE OR ANARCHY* (1947); REVES, *THE ANATOMY OF PEACE* (1945).

of control over all functions, from this moment on is Utopian.⁹ Specialists on character and personality, such as the psychiatrists, urge that all other tinkering with world power processes will be without much avail until we are able to devise methods for producing people who are less sadistic and masochistic, people more capable of respecting fundamental human dignity.¹⁰ A former Assistant Secretary of State, a specialist on communication, has recently referred to "a genuine understanding among the people of the earth" as "still the indispensable condition of a lasting peace."¹¹ Other specialists tend similarly to emphasize the critical importance of their particular interest and skills. Later I will offer still further examples and suggest a method of analysis which can build upon the valid emphasis in all of these approaches. It may be anticipated that rational action requires understanding of the interrelation of all variables and a workable conception of law. I omit all but a fleeting reference to the groups who over-emphasize the possibilities of violence. The horrors and difficulties of a preventive war I assume to be such as to remove it from any serious consideration as a rational alternative.

II. THE TRADITIONAL, BUT UNREALISTIC AND INADEQUATE, CONCEPTION OF INTERNATIONAL LAW AS DOCTRINE

Turning to our next point, it is well known that the traditional conception of International Law has been in terms of doctrine. The two words are commonly used to refer to a body of rules alleged to have succeeded to the authority of the Pope and Emperor in regulating the relations between states. This basic conception has endured through several centuries and through the greatest variety of justifications for particular systems and rules—justifications in terms of natural law, of the consent of states, of various combinations of these two, of more recent metaphysical, and largely incomprehensible theories of monism, dualism, auto-limitation, and so on.¹²

Typical modern expressions are:

Professor Brierly:

The Law of Nations, or International Law, may be defined as the body of rules and principles of action which are binding upon civilized states in their relations with one another.¹³

⁹Katz, *Who Are the Utopians*, 2 COMMON CAUSE 285 (1949); HUTCHINS and others, PRELIMINARY DRAFT OF A WORLD CONSTITUTION (1948).

¹⁰GLOVER, WAR, SADISM, AND PACIFISM (1935); Chisholm and others, *The Psychiatry of Enduring Peace and Social Progress*, 9 PSYCHIATRY 1 (1946). See also WEST, PSYCHOLOGY AND WORLD ORDER (1945) and CONSCIENCE AND SOCIETY (1942).

¹¹Benton, *Education for Peace*, an address before the Phi Beta Kappa Association of Southern California, Feb. 20, 1948. See also READ, EDUCATION FOR PEACE (1949) and ASCOLI, THE POWER OF FREEDOM (1949).

¹²A Useful brief history appears in Humphrey, *On the Foundations of International Law*, 39 A. J. I. L. 231 (1945).

¹³BRIERLY, LAW OF NATIONS 1 (3d ed. 1942).

Judge Moore:

By international law we mean the body of rules which regulate the intercourse of nations in war and peace.¹⁴

Ambassador Jessup:

... international law or the law of nations must be defined as law applicable to states in their mutual relations and to individuals in their relations with states.¹⁵

Note that Ambassador Jessup adds that the rules may relate to individuals, but nevertheless continues the emphasis on doctrine. Similar definitions in terms of doctrine could be offered from countless other authorities, ancient and modern.

The important point is that from this conception of International Law as doctrine, most writers, even those with the best of intentions, draw inhibiting and disastrous conclusions with respect to the role of law in the world power process.

Let us look at a few recent examples. Thus,

Sir Hartley Shawcross:

For law follows order: It does not precede it.¹⁶

Professor Brierly:

For law by its very nature is a conservative force.¹⁷

Professor Brierly ridicules those who "seem to imagine" that law "is a sort of sociological maid of all work" and insists that it is not the function of International Law to regulate the intercourse of peoples across boundaries. It is confined to delimiting the authority of states. Professor Brierly states:

There are two possible views about the relation of law to this task of organizing for the preservation of peace. It is a question of priority, of whether law is the instrument which we must use for the organization of peace, or one of the benefits that the organization will bring in its train. Professor Kelsen has recently put forward the former of these views in the most uncompromising terms.

"To eliminate war," he [Kelsen] writes, "the worst of all social evils, from interstate relations by establishing compulsory

¹⁴Moore, *Fifty Years of International Law*, 50 HARV. L. REV. 395 (1937).

¹⁵JESSUP, A MODERN LAW OF NATIONS 17 (1948).

¹⁶Shawcross, *International Law: A Statement of the British View of its Role*, 33 A. B. A. J. 31 (1947).

¹⁷BRIERLY, THE OUTLOOK FOR INTERNATIONAL LAW 125 (1944).

jurisdiction, the juridical approach to an organization of the world must precede any other attempt at international reform. . . . The elimination of war is our paramount problem. It is a problem of international policy, and the most important means of international law."

It is believed that this view is profoundly mistaken. There is no such phenomenon in human society as "the rule of law" in the literal sense of that term; force rules always, and the question on which the difference between good government and bad depends is always whether force is behind the law or elsewhere. Our common phrase "law and order" inverts the true order of priority, both historically and logically. Law never creates order, the most it can do is to help to sustain order when that has once been firmly established, for it sometimes acquires a prestige of its own which enables it to foster an atmosphere favourable to the continuance of orderly social relations when these are called upon to stand a strain. But always there has to be order before law can even begin to take root and grow. When the circumstances are propitious, law is the sequel, but it is never the instrument, of the establishment of order.¹⁸

Even more drastic is Professor Borchard:

As force grows in importance, the law recedes.

The assumption of numerous theorists that the weakness of international law is due to the lack of force behind it is responsible for much of the sorry thinking of the present day. International law is a primitive system, not because it lacks the support of force, but because it deals with sovereign states who cannot be coerced by other states without entailing war.

The theorists in their attempt to produce the new order by coercion, are driving out of existence international law, the only law that is able to survive among a congeries of states, none of whom is entitled to pass judgment on the others, and none of whom is able to enforce its judgment without inviting war.

The fact that states in the international constellation differ fundamentally from individuals in a municipal community, and that the method of and procedure for controlling them must of necessity be entirely different, has not been recognized by the

¹⁸*Id.* at 73.

seekers of a new world order, romantic chasers of the international rainbow.¹⁹

It is conceptions like these that cause many people to minimize the effects to be achieved by changes in the structures and processes of both formal authority and effective control at the level of world organization—such, for example, as changes in the veto provisions of the United Nations Charter or in the forces at the disposal of the United Nations.

III. THE NECESSITY FOR RELATING LAW TO THE WORLD POWER PROCESS

We come now to our third main point, the necessity for relating law to the world power process. Perhaps the easiest way to document the inadequacies of the traditional conception of international law as *doctrine* is to outline the possibility of a different approach. This approach does not underestimate the importance of doctrine in the world power process. We must recognize that the symbols by which men organize and express all their perspectives (demands, identifications, and expectations) do have a powerful effect on their behavior; psychiatrists are more than flip when they suggest that we all have our pulse-rates organized about a hierarchy of labels of varying degrees of abstraction. The doctrines of international law, in particular, are habitually used by both public officials and private citizens who occupy the greatest variety of power positions, national and international. They are invoked by our executives and diplomats. They are applied by our courts and appealed to by our legislators. The fact that all parties to the current Berlin and other disputes seek to found their actions and arguments in *legality* is testimony to the influence of these doctrines.

It is equally important, however, not to overestimate the role of doctrine. It is an obvious fact that the skilled and informed advocate, whether he is trying to persuade himself or others, seldom need be without a base in legality. The doctrines of international law, like those of national law, have in Mr. Justice Cardozo's apt phrase, the unfortunate habit of traveling in pairs of opposites. How deep antinomy is rooted in international law may be observed by contrasting "sovereignty" with "subjection to law," *pacta sunt servanda* (agreements must be observed) with *rebus sic stantibus* (but not if conditions have changed), and the contemporary illegality of war with the right of self-defense.

¹⁹Borchard, *The Impracticability of "Enforcing" Peace*, 55 YALE L. J. 966 (1946). The quotations are not consecutive statements and are taken from various portions of the article.

There is an old story that a philosopher can be defined as a blind man in a dark room chasing a black cat that isn't there. It is sometimes said that the lawyer goes the philosopher one better: He smuggles the cat in under his coat and then emerges to produce him in triumph.²⁰

The approach to international law which I am suggesting is not, however, founded upon this simple fact of doctrinal ambiguity. It seeks to take into account also some fundamental lessons from contemporary semantics, personality study, and social analysis and to build upon our now lengthy experience in techniques of democratic, public administration. It assumes that all human response, official and otherwise, is a function of many environmental and predispositional factors, and not merely of words. Among predispositional factors are attitudes, class, skill, and personality or character structure. The environmental factors that may influence a decision-maker include not only the facts of a particular controversy, and the technical legal standards and policy propositions invoked by the parties, but also the whole social or community context in which the decision-maker and parties find themselves. Technical legal words are but one among many variables that affect the response of the decision-maker. To put the point another way, it is an emphasis both of common sense and contemporary semantics that words can be given complete meaning only when located in context. The relevant questions for any communication are who, says what, to whom, under what conditions, how, and with what effects?²¹ This truism and these queries are no less applicable to the doctrines of international law than to other statements. To understand these doctrines we must locate them in the total community process of which they are a part.

I should like now to refer to a chart.²² This chart is an effort to offer a comprehensive presentation of the social process in a community of any size, to outline the total process in which this doctrine commonly called law plays its part. An observer can describe this social process in either one of two kinds of terms, either in terms of value variables or in terms of institutions. In terms of value variables, one may talk of people using power, respect, enlightenment, wealth, or any of the other values, as bases to effect a distribution of these same values among people. People use these values as bases for power by employing certain practices, by applying doctrines and techniques. Hence, further description in terms of institutions is needed, both to indicate in detail just what is meant by such high level words as power, respect, enlightenment and so on, and to describe

²⁰One of Dean Prosser's many creations.

²¹Elaboration appears in Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L. J. 203 (1943).

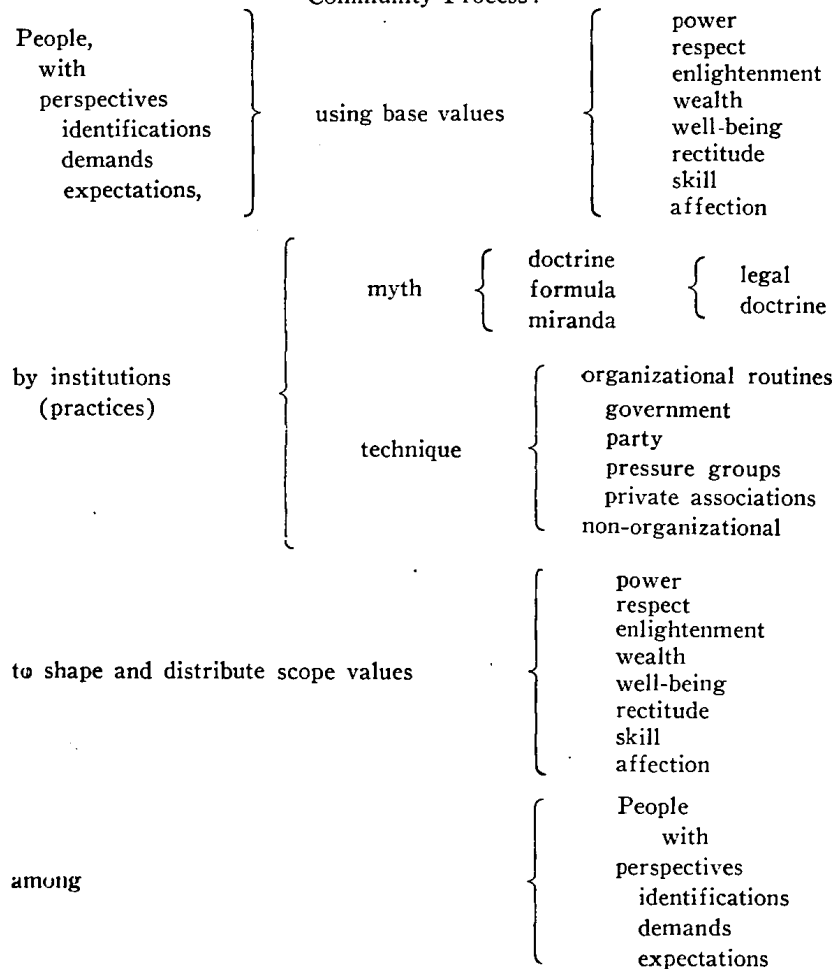
just how in fact such values are shaped and distributed in any given community.

Institutions can, as indicated, be broken down into doctrine and application, myth and technique. The organizations of our society can be categorized in terms of government, political parties, pressure groups, and private associations specialized to the production of any of the values.

It is here that we come to law. To acquire the most realistic understanding of law—to obtain the control of all variables necessary to effective action—we must, I submit, define law today in terms of both values and institutions. In terms of values, law is an element of the *power* structures and processes of a community, but any or all of the major values of a community can be used as bases of power. In terms of institutions, law

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CHART I
Community Process:



is a part of government, that structure of formal authority which includes the officials who are supposed to make the power decisions of a community, the doctrines by which they are supposed to make decisions, and the practices by which they are supposed to apply doctrines. It is common knowledge, however, in most communities that the formal facade of authority seldom represents the whole fact. Behind government or operating through government, the real rulers of a community, the people who make the important decisions, may be located in any one of the other types of institution, and these rulers may be using any one or all of the major values as bases to sanction their decisions. Thus, in Russia real power is obviously in the political party; in this country, in various communities, it is sometimes alleged to be in private business associations. An observer who would obtain a realistic picture of the role of doctrine, including an understanding of all the variables that affect decision, must, accordingly, identify the structures and procedures of both formal authority and effective control. Just what is the formal structure of government in this community, who is supposed to make the important decisions, and by what doctrines and practices? But formal authority without effective control is illusion. Who, on deeper scrutiny, actually makes the decisions, and what effects do they get? Shifting from a descriptive to a preferential perspective, it must be remembered, however, that effective control without formal authority is naked power and anti-democratic. Though to be effective law must include real power, to be democratic it must include formal authority, established on power widely shared. The conception of law to which we, as democrats who wish to be influential, should subscribe is, therefore, that of formal authority conjoined with effective control, and both widely shared.

It is clear, if the above analysis be sound, that any realistic description of International Law must locate both doctrine and practice (how doctrine is applied) in the total world power process in which they play a part in the shaping and distribution of values. The point of present emphasis is that when we think of the social process as people, with all their perspectives (their identifications, demands, and expectations) using any one or all of the major values of their community, by a great variety of institutional methods, as power bases to effect the shaping and distribution of all values, the effective role of doctrine becomes considerably smaller than the traditional presentation of law, whether municipal or international, assumes. From this perspective, doctrine comes to be regarded as composed not of autonomous absolutes but rather of symbols whose functions is to serve the total policies of their users.²³

²³More detail on the theoretical structure from which these remarks stem can be found in LASSWELL, *POWER AND PERSONALITY* (1948). Note especially the Appendix.

IV. HOW POWER IS SHAPED AND DISTRIBUTED ON THE GLOBAL LEVEL

It is our task now to apply the general analysis, outlined above, to the world power process and to consider its implications for a useful conception of International Law.

In this connection I should like to draw attention to another chart.²⁴ To obtain a realistic picture of the world power process, we must identify and describe the participants in that process, the arenas of their influence, the criteria by which they are admitted to participation, the bases of their power, the practices by which they shape and distribute power, and the effects that they get.

Looking comprehensively at the shaping and distribution of power on a global level, we see as the most obvious facts that there is not merely one type of participant in this process, the nation-state, as traditional theory assumes, but at least six different groups of participants and that people in each of these groups employ doctrines and practices differently, depending upon their positions, official and otherwise, the particular events

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CHART II

World Power Process

- | | | | | |
|---|---|---|---|--|
| I. National-States | | | | |
| A. Admission | { | people
resources
institutions | { | Government
Parties
Pressure Groups
Private Associations |
| B. Bases of Power | | | | |
| | | | { | legislative
executive
judicial |
| C. Practices | { | volition, consent, peaceful procedures
violence, coercion, war | | |
| D. Effects | { | people
resources
values | | |
| II. International Governmental Organizations | | | | |
| A. Admission-Membership | | | | |
| B. Bases of Power | | | | |
| C. Practices | | | | |
| D. Effects | | | | |
| III. Transnational Political Parties
etc. | | | | |
| IV. Transnational Pressure Groups
etc. | | | | |
| V. Transnational Private Associations
etc. | | | | |
| VI. Individuals
etc. | | | | |

or controversies with which they are concerned, the bases of their power and the techniques at their disposal, and their objectives. The nation-state is of course still by far the most important participant, but there are in addition international governmental organizations, transnational political parties, transnational pressure groups, transnational private associations (cartels), and individual human beings. The role of the nation-state in the total process is more and more affected by the powers and practices of the other five participants.

With respect to any particular participant it is necessary to ask and answer the same basic questions: How does this participant get admitted to the processes of formal and real power? What are the bases of its power? By what practices does it participate? What effects does it get? How compatible are these effects with the preferences of the observer?

The relevant inquiries may perhaps be made more meaningful by a brief preliminary characterization of the role of the nation-state. States get admitted to the formal processes of world power by a ceremony known as "recognition;" their admission to real power depends upon the bases of their power. The bases of their power can be found in their control over resources (territory, technology, etc.), their control over people, and their control over institutions. In terms of the latter, they have achieved a degree of internal organization and a certain independence of other power groups. The practices by which states shape and distribute power range from diplomacy, agreement, and peaceful procedures generally to the other pole of coercion, violence, and war. The effects that states get by these practices can be described in terms of the control they secure over people, resources, and value processes (wealth, respect, enlightenment, etc.).

Comprehensive investigation would pursue these inquiries and findings in utmost detail with respect to all participants in the world power process. How, for example, do groups get admitted to international governmental organizations? What are the criteria of admission? What is the organization's hierarchy of officials? What access do they have to the formal authority of nation-states? What are the organization's bases of power? By what practices does it operate? What effects does it get? And so on. The world power process, however, not only affects but is also affected by all the other value processes. Hence, once the power process has been outlined and an appraisal made of its effects on other values, it becomes necessary to make comparable study of the structures and processes of the other values (wealth, respect, enlightenment, etc.) and to appraise their effects on the power process.

In every context, realistic study must inquire into the especial role of doctrine, of myth, and seek to ascertain its exact effects on the shaping and distribution of values. It can safely be anticipated, however, as has been

emphasized above, that the attitude toward technical doctrine which any official or decision-maker takes will be found to be largely a function of where he is located in this power structure and of what he is trying to do—that he will be moved by the forum, the arena, he is in, by, for example, whether he is a judge on a national court or on an international court or is an arbitrator in a specially constituted tribunal; that he will be moved by who the parties before him are, what their objectives are, and what his appraisal of their objectives is; that he will be moved by, in other words, all his predispositional factors, and by many environmental factors, as well as by technical, legal doctrine.

The contrasting interpretations of the parties to the Berlin dispute are only dramatic documentation of what must be true, under conditions of world anarchy, in every case. The intention of the parties to a treaty may become as much a will-of-the-wisp to subsequent officials as the intent of legislators or founding fathers in statutory or constitutional construction.²⁵ Words, as we have seen, must take their meaning from a total context of people, time, conditions, and purposes. Try as they will the living cannot recreate the total context and the intentions of the past. Even if the intentions of the past could be made reasonably certain, the living will disregard interference with their own basic objectives. This difficulty is inherent in any law-making by the past for the present or the future. The living can be expected to preserve some continuity with the past, to exhibit some deference for precedent, but they are likewise always bending their inheritance of canonized doctrine and institutions to contemporary purposes. In the absence of officials to make and enforce interpretations from the perspectives, and in the interests, of the world community, the officials of nation-states can be expected to bend institutions and doctrines to divergent national purposes.

It may be observed, to take an illustration some distance from home, that the attitudes of the Russians toward international doctrines can be traced through a considerable variety of pragmatic tergiversations in recent decades. In the twenties, for example, they were strong for *rebus sic stantibus*, in order to escape their debt problems. Today they emphasize *pacta sunt servanda*, apparently hoping for a relatively peaceful world in which they can carry on their revolutions by infiltration.

Two more concrete examples may help to clarify the limitations of a purely doctrinal approach and to underline a difference between rational and irrational use of doctrine. Without overemphasizing their importance

²⁵The difficulties that inhere in such construction are outlined in McDougal and Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L. J. 181 (1945).

for the prevention of war, let us look at the Nuremberg trials. There has been a great hullabaloo among lawyers that the Nuremberg trials were illegal and vicious because, it is alleged, the charter for the trials created law after the commission of the offense. I should like to join with ex-Secretary of State Stimson and others in suggesting that this is a very limited view of the legal process. Mr. Stimson says:

It rests on a misconception of the whole nature of the law of nations. International law is not a body of authoritative order or statutes; it is the gradual expression case by case, of the moral judgments of the civilized world.²⁶

Another writer, Professor Meltzer of Chicago, has aptly said:

To shield the Nazi leaders by applying a principle designed to protect men who acted without knowledge of their culpability would involve a monumental perversion of justice. The mechanical application of a Latin phrase, however important the value it enshrines, should not be permitted to victimize the moral sense of the peoples of the world.

Where, as in the case of the Nazi aggression, there has been a grave, deliberate, and flagrant violation of widely accepted standards; where such a violation necessarily involved death and misery for millions, it is more important to condemn and punish such conduct than to follow literally the principle of retroactivity.²⁷

The point I would make is this: A decision-maker who seeks to make a rational use of doctrine in the power process, will ask himself this question: Will the judicial trial of the Nazi conspirators, or of the Japanese, do more to promote security in the future than their summary execution or their being allowed to go free? Will such trial do more than any practical alternative, to promote the values that we all have at stake? If so, he will put such values above any kind of a logical exercise or derivation from some mechanical manipulation of a doctrine that was invented to protect private individuals in a national government from the arbitrary power of that government. In other words, the critics of Nuremberg take arbitrarily a doctrine from the national power structure, carry it over into the international, and use it in a new context for completely different purposes from those for which it was designed.

For a second and more technical example, there is a relatively recent case from the Second Circuit Court of Appeals. It is known as the

²⁶Stimson, *The Nuremberg Trial: Landmark in Law*, 25 FOREIGN AFFAIRS 179, 180 (1947).

²⁷Meltzer, *Nuremberg Trials*, 14 U. OF CHI. L. REV. 455, 458 (1947).

*Bernstein*²⁸ case. Bernstein was a German of Jewish faith who was locked up by the Nazis, and while in jail forced to sign a cession of a steamship line that he owned. One of these ships was then sold to a Belgian corporation which took, with knowledge of the coercion, and bought for a fraction of the value of the ship. The ship was sunk at sea during the war and the proceeds of insurance put on deposit in a New York bank. When Bernstein got out of jail and got to this country, he became an American citizen and sued to collect the proceeds of this insurance. Our Second Circuit Court of Appeals said: it is too bad for Bernstein, but we can not look behind the "act of state" of the Nazi Government. The majority opinion which reached this decision referred to all the acts of our executives, and to all the acts of our military government in Germany, in setting aside such "acts of state" in Germany, and admitted that if those funds had been caught within our jurisdiction in Germany an opposite decision would have been reached. But it lamented, because of this traditional theory that we cannot look behind acts of state, we are compelled to reach our harsh and impolitic decision. If there had been an investigation of the real function of this doctrine of "act of state," of the contexts in which it had been invoked and the purposes for which it had been used along with a consideration of its relevance to the particular problem before the Court, the Court could, as a dissent suggested, have concluded the doctrine was just a misleading analogy or metaphor that had no real bearing on its case.²⁹

The important emphasis here, however, is that doctrine alone, no matter how rationally applied, is not enough. Upon the world scene, as upon the national, the formal authority of doctrine without effective control, of doctrine that is not sustained by appropriate organization and the necessary bases in real power, is mere illusion. The importance of clarified doctrine, of technical doctrine that is precisely related by operational definitions to basic values, need not be minimized. But it is an omnipresent lesson not rationally to be ignored, that effective control cannot be had by doctrine only. For the world community as for the nation-state, a workable conception of law must add to formal authority the real power that can bring community coercion to bear for community interest, and must open up for investigation all the factors that in fact influence the application of doctrine.

It may be added, if this conception of law be accepted, that much more doctrine becomes relevant than is traditionally included under the heading of public international law. When one considers the shaping and sharing of power on a global scale, and the effects of the practices outlined, the field

²⁸*Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246 (C.C.A. 2d. 1947), *cert. den.*, 332 U.S. 772 (1947).

²⁹The decision is thoroughly and soundly criticised in Comment, 57 *YALE L. J.* 108 (1947).

includes also what is commonly known as private international law or conflict of laws. These are doctrines announced and applied by national states to limit, in the interest of comity and certain world community objectives, their actual physical control or coercion with respect to territory, people, and value changes. Likewise, the studies traditionally known as "comparative law" become pertinent. The doctrines and practices by which élites in nation-states shape and distribute values not only affect the power of their nation-state in the world arena but also have direct external effects on the values of other peoples around the globe. Just as the formal authority and real power, the doctrine and practices, of the nation-state cannot be realistically studied apart from the world power process, so also the power process of the world community cannot be realistically studied without consideration of the internal structures and processes of its more important component parts. By exposing the degrees of equivalence and non-equivalence, in terms of basic values, in perspectives and practices in the various regions of the world, such study may both intensify the solidarity of peoples (where equivalences appear) and emphasize the necessities and opportunities for compromise (where non-equivalences appear).

It could be noted also, if this conception of law be accepted, that many of the ancient mare's nests of public international law dissolve into semantic quibbles. Thus, the repeated assertions by conservative professors that international *law* is fundamentally incompatible with international *organization*, that the whole notion of a real coercive power on the transnational level is inconsistent with the notion of sovereignty, and that the idea of a world police force rests on an utterly untenable set of contradictory assumptions, stand revealed as a complex of simple verbal confusions. When one thinks of sovereignty as merely the highest degree of formal authority in any group, there is no incompatibility in saying that there can coexist a certain degree of authority in nation-states with respect to the production of wealth and the shaping and sharing of other values, and a still higher degree of authority in a world government with respect to security, the control over violence. Similarly, the continued argument over whether international law is "real" law or not, over whether it has any sanction, becomes futile. It is obvious that all values and a great variety of institutional practices can be and are being used as power bases in different contexts to sanction international doctrines. Sometimes decision-makers have control of wealth, sometimes of real power in the form of force, again of enlightenment and so on; a fruitful approach requires the delineation of the exact role of both doctrine and practice, and of each value used as a base for power. Finally, the often alleged distinction between "legal" questions and "political" questions becomes one not so much of rationality as of arbitrary compromise in specific contexts. The whole function of

legal doctrines is to shape and apply power; they are an integral and indispensable part of that process, ordinarily called "political", by which all values are shaped and distributed. Any other conception of "law" leaves it a functionless "shape on paper or agitation in the air".³⁰

V. THE PRESENT ANARCHY IN INTERNATIONAL DOCTRINE AND PRACTICE WITH RESPECT TO MAJOR DEMOCRATIC VALUES

We come now to the present anarchy in international doctrine and practice with respect to major democratic values. Ideally a presentation of this point would include a comprehensive survey of international doctrine and practice with respect to each of our major values. Let's begin with *power* and look again in brief synopsis at Chart II on the World Power Process.³¹

With respect to the first and most important participants, nation-states, we observe that under present doctrine and practice they are almost completely free from external control, formal or real. In the absence of world community control of coercion, it is, and must be their consistent policy based on "sovereignty" and "nationalism" to maintain this freedom. Participation in and the admission of others to the formal processes of peaceful diplomacy, commonly called "recognition," is still entirely a matter of unilateral discretion. As a recent writer has said, the "simple truth is that it is governed by no rules whatsoever. The fact is that each nation reserves to itself the right to determine its own conditions and reasons for according recognition to a new state."³² Palestine is a recent example.

Considering bases of power, we observe that territory is still subject to the rule of capture, with complete state control over ownership. In terms of people, there is likewise unfettered state control over emigration and immigration. In terms of institutions, each state is left entirely free to determine what form of government and other organizations it will have, irrespective of consequences to the rest of the world.

With respect to the practices by which *power* is shaped, we find that on the world level we are still in the law of the jungle: that agreements are "valid" though obtained by duress, force, fraud, or coercion; that there is no machinery for the enforcement of agreements on the international level; that the doctrine of *rebus sic stantibus* permits states to get out of agreements pretty much at will; and that there is no legal requirement even that states continue diplomatic relations with each other, that they

³⁰A phrase used in another connection by I. A. Richards.

³¹The summary which follows draws on Dickinson, *International Law: an Inventory*, 33 CALIF. L. REV. 506 (1945), a statement which is both more comprehensive and more detailed.

³²Brown, *The Recognition of Israel*, 42 A.J.I.L. 620 (1948).

can sever formal communications at will. In other words, the processes for peaceful negotiation and agreement are almost without law. There are a few doctrines about the diplomatic privileges and immunities of agents, but these deal largely with an etiquette designed only to make peaceful negotiations efficient.

Shifting to the other polar mode of shaping and sharing power, violence and coercion, we find, though only very recently, that it is coming to be assumed that aggressive war is illegal. There are the United Nations Charter provisions, the Nuremberg precedent, the Kellogg pact, and so forth. Section 51 of the United Nations Charter, however, though imposing certain new conditions of inaction and review by the Security Council, expressly reserves the traditional right to self-defense, and no state ever goes to war except in what it regards or proclaims as self-defense. With respect to the conduct of war, future military necessity is likely to know few limits.³³ The etiquette of conducting hostilities can be expected to change even more drastically than in recent years to conform to the new imperatives of victory. To the newer technology may be added increase in the number of combatants, the receding distinction between civilians and combatants, total mobilization of resources, new developments in aerial warfare, and the advent of totalitarian states. The whole purpose of the new weapons being developed is quick and decisive destruction of an enemy's will and ability to fight and no nation is likely to permit doctrinal obstacles to stand in the way of that objective.³⁴

Viewing the effects of "jurisdiction", and of factual power, it is obvious that national states admit only very minor limitations on their control over territory, people and value processes.³⁵ There are exceptions from control for foreign ships, property of other governments, and occasionally for aliens, plus some few concessions under traditional private international law to encourage a precarious stability in private transactions. A presentation of these effects in broadest terms would require a resume of all the ills of present world anarchy.

The picture is little different for values other than power. Let us take *security*, considered as simple physical safety and freedom from aggressive violence. The failure of all traditional procedures is commonplace history. I have no desire to belittle the achievements of the United Nations, but the limitations of the organization are obvious. Its fundamental weakness could not be more clearly demonstrated than in its inability to settle

³³Schwartzberger, *Patterns of International Law and Organization in the Atomic Age*, 59 JURID. REV. 95 (1947).

³⁴SMITH, *THE CRISIS IN THE LAW OF NATIONS* 67 (1947).

³⁵It is here that the domains of traditional "public" and "private" international law overlap with considerable confusion.

the Berlin dispute. Consider what a difference it would make to the world if there were a representative, centralized authority with power to hear both sides and enforce a peaceful resolution of this controversy, securing the reasonable interests of all parties.

Turning to the value *wealth*, despite all the great range of organizations, the World Bank, the ITO, the Monetary Fund, and the specialized agencies of the United Nations, there is really very little being done to increase the efficiency of allocation, planning, and development practices. There is no long-term, comprehensive, and adequate planning and development program.³⁶ Taken together, the powers of all the related organizations are pitifully limited, and President Truman's Point "4" cannot be expected to fill the gap without a substantial strengthening of world organization.

Appraising trends about *respect* for human dignity, it is obvious that on the world level no protection is yet afforded the individual at all comparable to that secured by some of the best national constitutions. The Universal Declaration of Human Rights, the proposed convention on human rights, and the Genocide Convention are all heartening evidence of a growing unity in the perspectives of the peoples of the world and deserve the vigorous support of all democrats, but even assuming the genuine cooperation of those who dispose of power in nation-states, implementation will be difficult in a world of garrison states. When minimum security is desperately at stake, civil liberties and respect for human dignity can be expected to yield to paramount considerations of self-preservation.

The inevitability of similar conclusions for all other values—for enlightenment (freedoms of investigation and speech and press), for congenial personal relationships (freedoms of marriage and fraternal association), for standards of rectitude (freedoms of religion and scientific orientation), and so on—preclude repetition. In summing up our contemporary anarchy, I should like only to emphasize again the complete lack of any formal authority on the world level that can pretend to effective control over violence and the consequences that this entails for all other values. The world does not have, as the nation-state has, centralized governmental machinery adequate to bring the total coercion of the community to bear upon members who threaten to disrupt its values. Even political parties, pressure groups, and private associations have more effective control on the world level than has government. It needs little emphasis that the world as yet has no real legislature for declaring necessary policy,³⁷ that it is mocking the word

³⁶A more detailed description of both need and lack appear in McDUGAL and HABER, *PROPERTY, WEALTH, LAND: PLANNING, ALLOCATION, AND DEVELOPMENT* c. 12 (1948).

³⁷*Cf.* Dean, *International Legislation*, 33 A. B. A. J. 878 (1947).

"executive" to suggest that the Security Council of the United Nations is an effective instrument of executive functions, and that, as important as the new International Court is, it is in no sense a court, like our Supreme Court, coordinate with other branches of government and with power to determine compatibility of practices by other branches, and subordinate governmental units, with the basic principles of the United Nations.³⁸ The word anarchy alone suffices and it is accurate.

VI. THE CONDITIONS THAT PRODUCED THE CONTEMPORARY ANARCHY AND HOW CONDITIONS HAVE CHANGED

It is familiar history how our contemporary doctrines and practices of international law were made to measure for a world with only a fraction of its present population, with a pre-industrial technology, and with its principal power units very differently organized, and organized for different purposes, from the nation-states of today. Professor Bingham of Stanford has recently made scathing reference to "mechanistic adherence to traditional ill-digested generalities and slogans devised by theoreticians of an unscientific age of subsidized piracy, matchlocks, woodfires and candlelight, wide-open spaces, and glorification of cruel aggressive forces for selfish profit—theoreticians who could have foreseen little of the technology, industries, social pressures, and dominant impulses of our crowded, complex, modern civilization."³⁹

From a state of relative *independence*, many fundamental changes—changes in population, changes in the demands and aspirations of people, changes in techniques of organization, and most important of all, changes in technology, a technology which today for the first time makes possible either the total destruction of the world or a centralized world government with hitherto unimaginable creativity—have moved the peoples of the world to a state of more and more inescapable *interdependence*. Speaking about the confusion in our legal thought generally, I had occasion not long ago to attempt a somewhat systematic summary:

This confusion in legal thinking and action was inherited from a time—to draw the broader context—when Western European civilization was successfully expanding its colonization over the four corners of the globe, annihilating all who resisted or subordinating them as dependents to its imperial power.

³⁸Jessup, *The International Court of Justice and Legal Matters*, 42 ILL. L. REV. 273 (1947).

³⁹Bingham, *The Continental Shelf and the Marginal Belt*, 40 A. J. I. L. 173 (1946).

It was a time when the way of life which we know as private enterprise, with its minimum of community coercion, was free of any deep concern for its own future.

When men could pursue, secure, and preserve *wealth*, and use private wealth as a base for affecting the distribution of other values in the community, without too much regard for their effects on the community or how the community was likely to respond.

When men could pursue *power* and take for granted the stability of the framework within which they worked, without too much concern for the continuation of the values which gave them their power.

When men could pursue *enlightenment* after their own bent, without regard for the consequences—when men could smash an atom without expecting to smash mankind.

When every intellectual and artistic skill could be concerned with itself and its own idiosyncrasies, with a minimal regard for the community process which produced it and which it in turn affected.

When men could demand *respect* for themselves, without too much sensitiveness to the claims of others.

When differing conceptions of *morality*, of right, were developing with a minimum of effort at harmonizing the differences.

It was a time, in still more general statement, of intellectual and moral specialization and atomization, of the pluralization of interests, when each interest made demands for itself with scant consideration of the social context.

When every person, as well as every group and nation, felt relatively secure in pursuit of its own special interests, unconcerned with the larger whole of society.

When people still felt—despite tremendous innovations and changes in technology, in institutions, and in values—no imperative need to assimilate and integrate the great transformations they were experiencing.⁴⁰

It needs no special emphasis to informed people, capable and willing to face facts, that this is a time which has gone forever. So great, however, is the revolution demanded in all our thought and action, in all our perspectives and procedures, it may not be amiss to recall the grim warning issued last summer by the Emergency Committee of Atomic Scientists:

⁴⁰McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community*, 56 YALE L. J. 1345, 1347 (1947).

. . . we reiterate here our Six Point Statement published originally on November 17, 1946:

1. Atomic bombs can now be made cheaply and in large number. They will become more destructive.
2. There is no military defense against atomic bombs and none is to be expected.
3. Other nations can rediscover our secret processes by themselves.
4. Preparedness against atomic war is futile, and if attempted, will ruin the structure of our social order.
5. If war breaks out, atomic bombs will be used and they will surely destroy our civilization.
6. There is no solution to this problem except international control of atomic energy, and ultimately, the elimination of war.

Every scientific development in the intervening seventeen months has supported the accuracy of this statement.⁴¹

Like the atomic scientists, we all sense today that a very profound change has come over the world. With the peril to safety, so much greater than at any previous time in mankind's history, there is of course peril to all our other values. However nostalgic we may be, we all sense, furthermore, that we cannot achieve our own goals by attempting to act in splendid isolation from the effects of the rest of the world on us and from our effects on the rest of the world. It is recognized more and more that there is a "clear planetary indivisibility"⁴² of all peoples everywhere, not only as to the minimum value of physical safety, but as to all values—the sharing of power, and the production and sharing of wealth, well-being, enlightenment, health, and respect.

It is this fact of interdependence which is the most striking and urgent fact of the contemporary world. It is a fact which can be documented both territorially, with respect to each value around the globe and, functionally, as between all values.

In terms of power and security the documentation of interdependence is particularly obvious. Few will question, under threats of atomic and biological warfare, that no people can be secure from violence and aggression unless all people everywhere are secure. The very bipolarity of the existing power structure of the world is demonstration of a world community in fact. The governments of the United States and Russia, and of

⁴¹*A Statement by the Emergency Committee of Atomic Scientists, April 12, 1948*, 4 BULL. A. S. 176 (1948). The signers are Albert Einstein, Chairman, Harold C. Urey, Vice-Chairman, Harrison Brown, T. R. Hogness, Joseph E. Mayer, Philip M. Morse, H. J. Muller, Frederick Seitz.

⁴²SCHERMAN, *THE LAST BEST HOPE OF EARTH* 15 (1941).

all the other nations, are so obsessed, necessarily obsessed, by expectation of violence that they must calculate every proposed measure of cooperation with respect to wealth, enlightenment, human rights, and so on, in terms of its possible and probable effects on the balance of power, fighting effectiveness, and, hence, on their security.

Conversely, just as the production and sharing of wealth are dependent on security, security is dependent on wealth. Because of the demands of people around the globe, no nation is likely to achieve security unless there is a rising standard of living everywhere. Thus, paradoxically, a nation which because of fears about power consequences refuses to assist in building up the rest of the world, may, because millions of people elsewhere remain poor and envious and susceptible to invitations to violence, remain insecure. The intimate interrelation of considerations of security and considerations of wealth appears, further, in the Russian assumption indicated above, that capitalism is in its death throes and that capitalist countries may in a desperate effort to save themselves attack Russia.

The dependence of the production and sharing of goods and services in any one nation upon high standards of production and sharing in other nations, and upon cooperation between nations, can be stated in terms of a positive correlation. Economists have agreed for centuries that the greater the resources that can be drawn upon and the greater the division and specialization of labor, the greater the production of values. Nor is it seriously questioned that this result holds irrespective of whether exchange between areas is effected by individuals or by groups, governmental or otherwise.

The inevitable effects of security considerations upon such values as enlightenment and respect, and upon human rights generally, need no special emphasis in a world haunted by garrison states, in fact and in spectre. The dependence of all values upon enlightenment, and upon the methodically conscious use of foresight that is sometimes called planning, is equally obvious. One might make further reference to the dependence of security and wealth upon a wise use of respect, to the dependence of peace on character, and to the dependence of character on enlightenment and child-rearing. With respect to health, it is daily being proved that bacteria, viruses, and pathogenic protozoa know no geographical boundaries. J. B. S. Haldane has said, "Every Rumanian infected with infantile paralysis, every Indian with small pox, every rat with plague, diminishes the probable length of my life."⁴³

⁴³Quoted in Hiscock, *New Frontiers in Health Education*, 37 CAN. J. PUB. HEALTH 452 (1946).

The conclusion to which a more systematic and detailed analysis of all these interdependences would point is clear: the dependence of man upon man has become inescapably world-wide.

VII. THE CONDITIONS OF A DEMOCRATIC WORLD ORDER UNDER LAW

We come now to the critical issue. The formal answer, however, is clear: the conditions of a democratic world order under law must include both a distribution of values and a creation of institutions which will take adequate account of the interdependences described above. In terms of values the most important factor is, of course, power, and a democratic world order under law will require both a very high degree of concentration and a very wide dispersal of both formal and real power. A high degree of concentration of power will be required to bring world-wide community coercion to bear to maintain security, freedom from violence and aggression, and to provide a framework of policy and regulation which will permit the peoples of the world to pursue all their other values by peaceful procedures and with the greatest efficiency that resources and technical skills allow. A very wide dispersal of power, including a very wide sharing in control over the concentrated world security organization, will be required both to insure that values are pursued by procedures compatible with democracy and to secure the initiative and responsibility necessary to fullest production.

It is remarkable to what degree all observers—from philosophers to atomic scientists and political scientists, and even including bridge players and lawyers—who consider our long-term objectives and what conditions require today come to a single conclusion. Sometimes this conclusion is phrased in terms of the imperative necessity for a world “state;” at other times, in terms of such necessity for a “world police force.” When details of implementation are considered, the differences are largely semantic. Typical recent statements follow.

Professor Morgenthau:

Our analysis of the problem of domestic peace has shown that the arguments of the advocates of the world state is unanswerable: There can be no permanent international peace without a state coextensive with the confines of the political world. The question which calls now for our attention concerns the way in which a world state can be created.⁴⁴

Professor Rabinowitch:

In the light of the present and impending developments in military technology, there is only one realistic blueprint for se-

⁴⁴MORGENTHAU, *POLITICS AMONG THE NATIONS* 398 (1948).

curity for any one nation: the subordination of *all* nations to international law and order, and elimination of their right and actual ability to wage war. The establishment of such a community of law-abiding (and not merely "peace-loving") nations is the only intelligent long-range aim of foreign policy. This beacon should guide our day-to-day political decisions; we should not permit its light to be obscured by storms of national passions and fogs of ideological confusion.⁴⁵

An appropriate distribution of power is not, however, the only condition of a democratic order under law. Comprehensive specification would include such other items as, in terms of values, a certain balance of income and wealth, a lack of discrimination for reasons irrelevant to capacity under respect, the flow of realistic information under enlightenment, less destructive personality formation under character, a growing standard of common right under rectitude, and, in terms of institutions, the kind of constitutional charter, modes of representation, allocation of functions, structures of administration, and procedures required for the democratic and effective performance of legislative, executive, and judicial functions. As difficult as this comprehensive specification may prove, there is reason to hope that, when the nation-states of the world come to a genuine willingness to cooperate on security problems, our long experience with democratic constitutions and public administration in areas less than the world and the contemporary developments in social and physical science will bring the necessary technical recommendations within our competence. Details will of course depend upon the context of the time and the compromises necessary to secure action.

It is with respect to short-run objectives and immediate steps, designed to bring states to a more genuine willingness to cooperate on security problems, that debate rages most fiercely. In this connection I should like, with deference, to refer to a statement made last spring by General Marshall, as Secretary of State, and to suggest that it prescribes an approach considerably short of what may prove most practicable. Opposing efforts of proponents of a general revision of the United Nations charter, General Marshall spoke as follows:

⁴⁵Rabinowitch, *The Narrow Way Out*, 4 BULL. A.S. 185 (1948). Comparable expressions abound in the literature. See, generally, *Hearings before the House Committee on Foreign Affairs*, 80th Cong. 2d Sess. (1948), *Structure of the United Nations and the Relations of the United States to the United Nations*; SCHUMANN, *INTERNATIONAL POLITICS* (4th ed. 1948); Wright, *The Study of War*, 2 *WORLD POLITICS* 243 (1949); BALDWIN, *THE PRICE OF POWER* 316 (1947); COUSINS, *MODERN MAN IS OBSOLETE* (1945); Friedwald, *The Atomic Deadlock Could be Broken*, 4 BULL. A. S. 363 (1948); Osborne, *The Crusade for World Government*, 3 BULL. A.S. 359 (1947).

A number of projects designed to improve international conditions by new forms of international organization have been proposed. These projects envisage radical changes in the existing United Nations Charter.⁴⁶

He then outlines some of the projects and conditions, and continues:

All of these projects appear to rest on the assumption that the present unsatisfactory state of world affairs is a result of inability on the part of the United Nations to prevent aggression; that this inability arises from the exercise of the veto power in the Security Council and the lack of a United Nations police force; that if the veto power on enforcement decisions could be removed and the United Nations provided with armed forces, aggression could be prevented; and that the principal barrier to world peace would thereby cease to exist.

The general assumption rests I think on an incomplete analysis of our main problems of foreign policy at this juncture and of the part which international organization can play in solving them.

The underlying problem in the immediate future is to bring about the restoration of economic, social, and political health in the world and to give to the peoples of the world a sense of security which is essential for them to carry on the task of recovery. What is needed for the achievement of a world order based on law and dedicated to peace and progress is a widespread improvement in the material and social well-being of the peoples of the world.

The General continues at some length in comparable terms.

No one would question that the improvements proposed by General Marshall are needed for a democratic world order under law. But because of the expectations of violence which have been emphasized above, because of the dependence on security of all these other values which General Marshall rightly stresses, and because people will not, and cannot be expected to, cooperate with respect to wealth and other values in any real measure without calculating the effects of their cooperation on the balance of power and security, I submit that we can expect no very real achievement on the other values unless something is done, until effective action is taken, on the security problem. The negotiation of the Atlantic Pact is recent recognition of the primacy of security and the real question

⁴⁶Hearings, *supra* note 45, at 39; printed also in 18 DEP'T STATE BULL. 463 (1948). The statement was made on May 5, 1948, to the House Foreign Affairs Committee.

is whether we should not continue to explore and propose security alternatives that admit of world-wide compass.

I might put the point another way: You will recall the writers who insisted that order comes before law and not law before order. I should like to suggest that the process is actually one of continuous interaction of interdependent variables, that order affects law (power processes in which formal authority is conjoined with effective control) and law affects order (peaceful procedures in the pursuit of all values), that power affects production and the sharing of wealth and that the production and sharing of wealth affects power, and so on. Rational policy requires us to explore and propose all hopeful alternatives, to catch hold of any handle, to obtain control of any factor we can to affect this continuous process, and not to assume that any one alternative is the only answer or any one factor the only significant variable. In terms of priority of action, of immediate tactics, there is good reason, however, to believe that nothing very consequential can be done about other values except in a context of alternatives which promise that the power-security problems will be resolved in considerable measure.

It is necessary, finally, to dispose of a small group of dissenters who appear to suggest that, even assuming a genuine willingness on the part of the nation-states of the world, it is technically impossible to create effective centralized control to maintain security. This group minimizes the potentialities of any effort to improve the United Nations, such as by changing the veto provisions, and in general tends to scorn proposals for strengthening the structure of formal authority on the world level—thereby giving comfort to isolationist, suicidal sentiments. Most members of this group cite for support an article by Professor Jacob Viner, written early in 1946 before perhaps the full implications of the new technology were clearly apparent. The most often quoted passage from Professor Viner reads:

The United States and Soviet Russia are each too strong, relative to the total power potential of the world, to be proper members of a world government, even if their governments and their peoples were genuinely willing to enter such a government. In a narrow legal sense sovereignty can easily be formally surrendered, but actual power is more difficult to surrender and can be effectively surrendered only to an agency still more powerful. In the present state of the world such an agency with superior power not only does not exist but cannot be manufactured out of existing ingredients, even if the genuine will to do so existed, *unless that will goes to the extent of preparedness on the part of the United States and of Soviet Russia to dismember themselves.* Splitting the United States and splitting Soviet Russia seem to

present a more difficult problem than splitting the atom proved to be. Setting up a facade of world government where the power-basis for its successful functioning was not present would be worse than useless. No government would be fooled thereby into a false sense of security, but every government would be impelled to pretend that it was, and all diplomacy would be carried out in an atmosphere of superficially-concealed insincerity.⁴⁷

If what Professor Viner is saying (a construction which requires some distortion of his words) is that, despite any *apparent* agreement, it will be difficult to get the *genuine* agreement of the élites and peoples of the world, to provide them with incentives in fact and to expand and intensify their loyalties, for an effective security organization, one can only agree, still insisting that we set promptly and resolutely to the task. If, on the other hand, what he is saying is that given consent it is technically impossible to fashion a disarmament program for nation-states and to establish a world police force capable of maintaining a reasonable security, the question becomes one for the appropriate technical experts and most of these appear to disagree with Professor Viner. A typical summary of many expressions can be taken from President A. H. Compton:

Now for the first time also it becomes feasible for a central authority to enforce peace throughout the world. Before the second World War, many parts of the earth were difficult of access by a world police. Today this is changed. Fast airplanes, long-range rockets, and atomic bombs have now solved the technical problem of bringing to bear on any area at any time, whatever destructive force may be required to quell resistance. A central authority having virtual monopoly of these major means of warfare can now be equipped to enforce international peace.⁴⁸

VIII. RATIONAL ALTERNATIVES IN A BI-POLAR POWER STRUCTURE

It needs no great prophetic insight, however, to anticipate that no genuine willingness of nation-states to create an effective, world-wide security organization can be expected in the calculable future. We come finally, therefore, to rational alternatives in a bi-polar world. For us as Americans, rational alternatives seem to me to require a three-fold program:

First, we can continue, as we are doing, to attempt to contain Russia and the Communist Party by peaceful means.

⁴⁷Viner, *The Implications of the Atomic Bomb for International Relations*, 90 PROC. AM. PHILOSOPHICAL SOCIETY 56 (1946).

⁴⁸Quoted in BLACKETT, FEAR, WAR, AND THE BOMB 91 (1948).

Second, we can undertake the tighter and tighter organization of the free part of the world not only by such limited purpose devices as the Atlantic and comparable pacts, but also by preparing and proposing a model for more comprehensive organization on a regional basis, always leaving open the possibility for admission, at a more propitious future time, of new regions from behind the iron curtain.

Third, we can continue to take the initiative in clarifying for ourselves and others the kind of world community in which we as democrats would like to live and the kind of world community organization, in utmost detail, which can guarantee security and democratic values for all people. The assumption and exercise of moral leadership in the name of all peoples can only add to our national strength, which may be indispensable to force certain necessary compromises.

To return for a moment to the role of doctrine, it is important to recognize that some of the traditional doctrines and practices of international law may contribute to our purposes. For this reason the agitation in the United Nations for the codification of international law can be encouraged, in the hope that it may result in a real clarification of policies. It is important also to recognize that during a period of transition, while the globe is broken up into Russian centered and American centered orbits, much of our effective international doctrine and practice will be in fact adjusted to the needs of those who share our objectives and are willing to work with us toward their realization. Hence, while we have in mind the globe as a whole, we may have to recognize that the principal function of our clarified doctrines and practices will be to smooth relationships among states in our part of the world community. The fact that doctrine which is phrased in the name of all nations of the world does effectively apply to some of them only is no novelty. The history of the development of international law and practice is not the history of a concerted effort among equals throughout the globe. It is on the contrary a history of conceptions which clarified the values for the most part of people who in modern times have shared the values of Western European civilization. The problem of this time is to reconsider the adequacy of traditional doctrines and practices for the task of bringing into effective working relationship all the peoples with whom we can cooperate.

The task of building an effective democratic world community organization with appropriate doctrine and procedures, to include first the Western-centered orbit and eventually the Russian, poses, it must be admitted, problems of the greatest difficulty for professional specialists and will require the firmest public support. It is this objective, however,—the objective of an organization that can guarantee reasonable security and free us for the peaceful pursuit of all other values—that we should hold

constantly before us, whatever the temporary compromises that conditions may require. As indispensable as a balancing of power policy is under contemporary conditions, in the end, if it is not replaced by an effective world police force, the high probability is—all history shows—that it will lead to war.⁴⁹ The demand upon us, the opportunity for us, is to exercise for the new conditions of our time the same acumen and creativeness which led, in the sixteenth and seventeenth centuries, to formulation of the basic principles and practices of the modern era. This demand has been most eloquently phrased by Professor Einstein. In a recent statement he says:

Our situation is not comparable to anything in the past. It is impossible, therefore, to apply methods and measures which at an earlier age might have been sufficient. We must revolutionize our thinking, revolutionize our actions, and must have the courage to revolutionize relations among the nations of the world. Cliches of yesterday will no longer do today, and will, no doubt, be hopelessly out of date tomorrow. To bring this home to men all over the world is the most important and most fateful social function intellectuals have ever had to shoulder.

A tremendous effort is indispensable. If it fails now, the supra-national organization will be built later, but then it will have to be built upon the ruins of a large part of the now existing world. Let us hope that the abolition of the existing international anarchy will not need to be bought by a self-inflicted world catastrophe the dimension of which none of us can possibly imagine.

The time is terribly short. We must act now if we are to act at all.⁵⁰

⁴⁹Helen Mears, in *MIRROR FOR AMERICANS: JAPAN* 317 (1948), graphically depicts the difficulties of a balancing of power policy: "Nothing could be more clearly designed to highlight the failure of the system of balance-of-power politics than the relations of Britain and the United States to both Japan and Russia during Japan's modern period. Looking at the record, and stating it in its simplest, most obvious terms, the British "security" system looks like nothing so much as a bowling alley in which nations are set up like tenpins only to be knocked down again. First Japan was set up to knock down Russia. Then Japan proved "unreliable" and we set up Russia (Remember Yalta!) to help knock down Japan. Now it appears that Russia is already even more "unreliable" than Japan, so we are trying to get China set up, by establishing a strong centralized regime, under the "progressive" Chiang Kai-Shek, to help knock Russia down again. We are also, of course, attempting to "stabilize" Korea for the same purpose. The Japanese islands are thought of as a base for such proceedings. If this nonsense isn't stopped—and if war doesn't come in the meantime—twenty years or so from now we'll be building up Japan or Russia again, to knock down China."

⁵⁰4 BULL. A.S. 295, 299 (1948).